

TONYA R. BEARD)	
Claimant)	
VS.)	
)	Docket No. 1,045,143
MIDWEST HEALTH MANAGEMENT)	
Respondent)	
AND)	
)	
UNITED WISCONSIN INSURANCE COMPANY)	
Insurance Carrier)	

Respondent appeals the June 17, 2009, preliminary hearing Order For Compensation of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded temporary partial disability compensation (TPD) pending the receipt of an independent medical evaluation (IME) report. Respondent also appeals the June 17, 2009, Order Referring Claimant For Independent Medical Evaluation which refers claimant to the Dickson Diveley Orthopedic Clinic for an evaluation and disability rating, and for recommendations regarding future medical treatment.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held June 16, 2009, with attachments; and the documents filed of record in this matter.

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent? Respondent argues that claimant's injuries resulted from the simple act of standing

and leaning and, under *Johnson*,¹ claimant is not entitled to benefits under the Kansas Workers Compensation Act (Act). Claimant contends respondent's description of the accident is inaccurate.

2. Did the ALJ err in ordering TPD? Claimant argues that the Board does not take jurisdiction of this issue on appeal of a preliminary hearing order. Respondent argues this issue is dependent on issue number 1.
3. Did the ALJ err in ordering an IME?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Compensation should be affirmed.

Claimant, a certified nursing assistant (CNA), has worked for respondent since July 2008. She has been a CNA for a total of 13 years. On April 10, 2009, she was assisting a nurse/physical therapist named Carol in attempting to stand a resident named Olga up from a chair. Claimant placed her left hand on Olga's back and assisted her in standing. When Olga came back toward claimant, claimant placed her left hand on Olga's buttocks and tried to lift her. Claimant experienced a sudden onset of pain in her low back. At some point, claimant also began experiencing pain into her left leg from her hip to her knee, and the toes of her left foot were going numb.

Claimant has a long history of back problems. She suffered a slip and fall in 1993, was diagnosed with spondylolysis at L4 and degenerative disc disease at L4 through S1 in 1999, and sought low back medical treatment several times from 2002 through 2008. Additionally, in 2008, an MRI indicated a moderate disc protrusion impinging on the nerve root at L4-5. In February 2009, claimant reported to Chris D. Fevurly, M.D., that she was taking eight Lortabs daily for both shoulder and low back pain. On March 2, 2009, claimant was seen by Topeka neurosurgeon David P. Fritz, M.D., for an evaluation. An MRI was accomplished, and claimant was advised that surgery was recommended. On March 9, 2009, Dr. Fritz recommended "a right-sided L4-5 hemilaminectomy, medical [*sic*] facetectomy and foraminotomy"² with lumbar fusion and pedicle screw fixation for the L4-5 spondylolisthesis and disc herniation. When claimant was examined by Dr. Fevurly on June 1, 2009, he opined that the mechanics of claimant's injury would not have caused a low back injury.

¹ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, rev. denied 281 Kan. ____ (2006).

² P.H. Trans., Resp. Ex. E (Report from Dr. Fritz dated March 9, 2009).

Claimant was examined at her attorney's request by orthopedic surgeon William A. Bailey, M.D., on May 26, 2009. Respondent argues that Dr. Bailey did not have a complete history of claimant's past back problems. A reading of Dr. Bailey's report would support that argument, as Dr. Bailey only discussed back problems that occurred in 2006 and thereafter. However, he did have the more recent medical reports indicating x-ray and MRI tests. Dr. Bailey's evaluation also noted new symptoms in claimant's left leg, and the toes of her left foot. These new symptoms, he determined, would be related to the recent incident on April 10, 2009.

Respondent argues that claimant had suffered left leg symptoms in the past. However, the medical reports from the Lawrence Memorial Hospital emergency room on March 27, 2007, indicate only a leg strain after claimant felt something in her lower leg pop. An ultrasound from March 27, 2007, was read as normal, and claimant's low back is not mentioned in either report.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁴

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁵

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or

³ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 2008 Supp. 44-501(a).

origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment if it arises out of the nature, conditions, obligations and incidents of the employment.”⁶

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.⁷

This record supports respondent’s argument that claimant had a long history of low back problems. However, claimant did not have a long history of back-related left leg problems. These symptoms are new since the April 10, 2009, incident with Olga. This Board Member finds that claimant did suffer a new accident with resulting injuries on April 10, 2009.

An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.⁸

An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.⁹

Respondent argues that claimant’s accident was nothing more than a normal activity of day-to-day living and cites *Johnson* in support of that argument. In *Johnson*, the claimant injured her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file. Johnson had a history of knee problems with a diagnosis of years of degeneration. Dr. Jennifer Finley stated that it was just a matter of time. The Kansas Court of Appeals, in reversing the award of benefits by both the ALJ and the Board, stated that they “do not find substantial evidence to support the Board’s finding that Johnson’s act of standing up was *not* a normal activity of daily living.”¹⁰ The Court went on to state that an injury is compensable only if, “*inter alia*, the ‘employment exposes the worker to an increased risk of injury of the type actually sustained.’”¹¹

⁶ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

⁸ *Johnson*, *supra*, at Syl. ¶ 1.

⁹ *Id.* at Syl. ¶ 2.

¹⁰ *Id.* at 789.

¹¹ *Id.*

Here, respondent described claimant's actions as standing and leaning. However, claimant's description of the incident is more involved. Claimant, while standing and leaning, was also actively attempting to lift Olga from a chair. It was when Olga came back to claimant that the injury to claimant's low back and left leg occurred. It would be a strange society where putting one's hand on another's buttock and attempting to lift him or her from a chair was seen as a normal act of day-to-day living. This Board Member does not see claimant's actions in trying to assist Olga out of the chair to be a normal activity of day-to-day living. It is, instead, an attempt to help lift a patient out of a chair. Therefore, respondent's attempt to avoid liability in this matter, based on *Johnson*, fails. The award of benefits by the ALJ is affirmed.

Respondent also objects to the IME Order of the ALJ.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?¹²

The need for an IME is a decision within the authority of the ALJ at a preliminary hearing. The Board does not take jurisdiction of this issue on an appeal from a preliminary hearing order. Respondent's appeal of this issue is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

¹² K.S.A. 44-534a(a)(2).

¹³ K.S.A. 44-534a.

as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered an accidental injury which arose out of and in the course of her employment with respondent. The Order For Compensation of the ALJ granting TPD is affirmed. Additionally, as the ALJ did not exceed his jurisdiction in ordering the IME, respondent's appeal of this issue is dismissed, and the Order Referring Claimant For Independent Medical Evaluation remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated June 17, 2009, should be, and is hereby, affirmed and the Order Referring Claimant For Independent Medical Evaluation remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

HONORABLE GARY M. KORTE

c: Timothy G. Riling, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge